Supreme Court, U.S.
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No. 99-866

IN THE

Supreme Court of the United States

ORSON, INC.,

Petitioner,

v.

MIRAMAX FILM CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Miramax Film Corp., is an indirect wholly owned subsidiary of The Walt Disney Company which is publicly traded.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	v
Counterstatement of the Case	1
A. The Business of Miramax.	1
B. Film Licensing in Central Philadelphia.	3
C. The Present Action.	4
Reasons for Denying the Writ	7
Argument	8
I. There is No Reason to Grant Certiorari on Orson's Antitrust Claims.	8
A. The Third Circuit faithfully followed the decisions of this Court and an "avalanche of authority" in permitting Miramax to grant exclusive licenses to the Ritz.	8
B. The Third Circuit's decision is consistent with, and supported by, the Ninth Circuit's opinion in *Harkins*.	11

Contents

Page

II. There is No Reason to Grant Certiorari on Orson's Claim Under the Pennsylvania Act. 15

A. The United States Copyright Act — as confirmed by this Court's decisions — grants a copyright holder the right to grant an exclusive license, as well as the right to "refuse to license" the copyrighted work. 15

B. The Court of Appeals correctly followed this Court's precedents in holding that a state law which restricted a copyright holder's right to grant an exclusive license, or which restricted the copyright holder's unilateral decision to refuse to grant a license, was preempted by federal law. 19

C. The Court of Appeals' decision is consistent with, and indeed supported by, this Court's decision in *Interstate Circuit* and other cases involving concerted refusals to deal. 23

Contents

Page

D. The decision of the Court of Appeals for the Third Circuit in this case is consistent with the Sixth Circuit's decision in *Allied Artists*, which Orson admits did not contain a restraint on the copyright holder's ability to grant an exclusive license. 26

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Ace Beer Distributors, Inc. v. Kohn, 318 F.2d 283 (6th Cir. 1963), *cert. denied*, 375 U.S. 982 (1964) 9, 10

Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982) 16, 26, 27

Associated Film Distributions Corp. v. Thornburgh, 683 F.2d 808 (3d Cir. 1982) 20

Association of Am. Medical Colleges v. Cuomo, 928 F.2d 519 (2d Cir. 1991), *cert. denied*, 502 U.S. 862 (1991) 20, 21

Avtec Sys., Inc. v. Peiffer, 21 F.3d 568 (4th Cir. 1994) 20

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 9, 12

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 20, 23

Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168 (9th Cir. 1988) 9

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 22, 23

Cited Authorities

Page

College Entrance Examination Bd. v. Pataki, 889 F. Supp. 554 (N.D.N.Y. 1995) 21

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988) 8

Elder-Beerman Stores Corp. v. Federated Dep't Stores, 459 F.2d 138 (6th Cir. 1972) 8, 9

Fox Film Corp. v. Doyal, 286 U.S. 123 (1932) ... 16, 24

Freightline Corporation v. Myrick, 514 U.S. 280 (1995) 22, 23

Futurevision Cable Systems of Wiggens, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993) 9

GTE Sylvania Inc., v. Continental T.V., Inc., 537 F.2d 980 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977) 8

Harkins Amusement Enterprises, Inc. v. General Cinema Corporation, 850 F.2d 477 (9th Cir. 1988) 11, 12, 13, 14, 15

Interstate Circuit v. United States, 306 U.S. 208 (1939) 16, 23, 24, 25

Jones v. Rath Packing Co., 430 U.S. 519 (1977) .. 17, 19

Cited Authorities

	Page
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)	19
K.M.B. Waterhouse Distributors, Inc. v. Walker Manufacturing Co., 61 F.3d 123 (2d Cir. 1995)	15
Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980)	19
Naumkeag Theatres Co., Inc. v. New England Theaters, Inc., 345 F.2d 910 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965)	10
Northeastern Educational Television of Ohio, Inc. v. Educational Television Assn., 758 F. Supp. 1568 (N.D. Ohio 1990)	9
Nynex Corp. v. Discon., Inc., 525 U.S. 128, 119 S. Ct. 493 (1998)	14
Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957)	8
Philadelphia Fast Foods, Inc. v. Popeyes Famous Fried Chicken, Inc., 647 F. Supp. 216 (E.D. Pa. 1986)	9

Cited Authorities

Page

Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc., 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981) 8

R.W. International Corp. v. Welch Food, Inc., 13 F.3d 478 (1st Cir. 1994) 9

Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981) 16

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 19, 20

Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942) 20

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 17

Stewart v. Abend, 495 U.S. 207 (1990) 16

Storer Cable Communications v. City of Montgomery, 806 F. Supp. 1518 (M.D. Ala. 1992) 20, 27

Theee Movies of Tarzana v. Pacific Theaters, Inc., 828 F.2d 1395 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) 10, 11

Cited Authorities

Page

TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992) 8

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 10, 14, 25

Watson v. Buck, 313 U.S. 387 (1941) 25

Statutes:

Copy Right Act Section 106 ..... 16, 17, 18, 20, 22, 25

Copy Right Act Section 301 ..... 16, 17, 18, 19

Copy Right Act Section 301(a) 15

15 U.S.C. § 1 4

17 U.S.C. §§ 101 *et seq.* 1, 6, 7

17 U.S.C. § 106 ..... 7, 17, 18

73 Pa. Cons. Stat. Ann. § 203-1 5

73 Pa. Cons. Stat. Ann. § 203-7 ..... 1, 5, 6, 18

73 Pa. Const. Stat. Ann § 203-10 6

Cited Authorities

Page

United States Constitution:

U.S. Const., Art. I, Sec. 8, cl. 8 7

U.S. Const., Art. VI 19

COUNTERSTATEMENT OF THE CASE

Petitioner Orson, Inc. ("Orson") seeks review by this Court of a unanimous decision of the Court of Appeals for the Third Circuit, sitting *en banc*, that applied well-established principles of copyright law and preemption analysis to Pennsylvania's "42-day provision," 73 Pa. Cons. Stat. Ann. § 203-7. The Court of Appeals held, without dissent, that the 42-day provision, which limits the duration of exclusive first run licenses under copyright to forty-two days was preempted by the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, 106, and by the Supremacy Clause of the United States Constitution (92a-107a). Orson also seeks review of the Court of Appeals' earlier affirmance of summary judgment against it on its antitrust claim.

Contrary to Orson's petition, which substitutes rhetoric for reason and atmospheric adjectives such as "clandestine conspiracy" (Petition at 3) for facts, the Court of Appeals' unanimous decision is entirely consistent with both this Court's jurisprudence and the jurisprudence of the Sixth and Ninth Circuits. In short, no conflict among the circuits, no departure from precedent, nor any other legal principle, warrants this Court's review of the Court of Appeals' *en banc* ruling on the preemption issue or its dismissal of Orson's antitrust claims.

Because Orson's statement of the case is both incomplete and incorrect, Miramax Film Corp. ("Miramax") Miramax submits the following brief summary of the relevant facts.

A. The Business of Miramax.

Miramax is a distributor of feature motion pictures. Miramax is particularly known for the critically acclaimed specialty films it distributes, many of which have received numerous Academy Awards and Golden Globe Awards.[1] All of

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1. The films at issue in this case include such critically recognized motion pictures as "The Crying Game," "Delicatessen," "Double Life of Veronique," "Enchanted April," "Ethan Frome," "Farewell My Concubine," "High Heels," "Map of the Human Heart," "Mediterraneo," "Passion Fish," "The Piano," "Reservoir Dogs," "Snapper," "Strictly Ballroom" and "Zentropa."

the films released by Miramax during the time period at issue in this case were registered with the Copyright Office and are protected by the Copyright Act. Miramax's high-quality, lower budget films often appeal to a more limited audience than do big-budget, "blockbuster" films. In contrast to more commercial films, which are generally distributed in wide release (that is, on a large number of screens nationwide on a given date), specialty films like those distributed by Miramax are often released initially to a limited number of carefully chosen theatres, and are expanded to other venues only after the film has garnered favorable word-of-mouth or critical review. Thus, the choice of a theatre is of particular importance for such films.

Miramax distributes its films worldwide and, like other distributors, licenses many of its film for exhibition in central Philadelphia. No evidence was presented in this case to suggest any scarcity of available film fare (including both commercial and specialty films) in central Philadelphia during the relevant period.

Like other film distributors, Miramax licenses its films to theatres for exhibition for a designated amount of time. Frequently, the license is exclusive to a prescribed area for the duration of the license (23a). Those exclusivities are referred to as "clearances." The use of exclusive licenses in given areas for specialty films is often a practical necessity, because those films generally attract a smaller audience that is insufficient to sustain multiple theatres showing the same film in the same area, and because of the cost associated with generating multiple prints of a film (23a).

The period of time during which a particular exhibitor is licensed to show a film is called a "run." A "first run" is the first exhibition of a film in a given geographic area. "Subsequent runs," by definition, follow the first run. The length of the first run and any subsequent runs depend in large part on the distributor's and exhibitor's estimation of the film's likely success.

The first run is particularly critical for low-budget specialty films. Unlike big budget commercial films, which are widely released and backed by extensive promotional efforts and expenditures, the success of specialty films depends primarily on word-of-mouth response and favorable critical reviews for their longer term success. To attract audiences, it is important that such films be exhibited on their first run at the most desirable and most popular venues.

Films are generally licensed under a formula which divides those revenues between the exhibitor and the distributor that exceed a "house allowance" (a dollar amount which approximates the exhibitor's weekly expenses) (23a). The exhibitor then retains a percentage of the weekly gross from ticket sales above the house allowance, and the remaining percentage is paid to the distributor. The revenues of both the distributor and exhibitor ultimately depend both on the public's response to a particular film, and on the ability of a particular theatre to attract the movie-going public. The distributor's choice of a theatre is premised upon many factors that create its perception of a particular theatre's ability to attract audiences.

B. Film Licensing in Central Philadelphia.

Orson owned and operated the Roxy Screening Rooms (the "Roxy"), a movie theatre located in central Philadelphia, after January, 1992. The Roxy exhibited specialty films on two screens, each with a 140 person seating capacity.

During the same time period, the Ritz Theatres (the "Ritz") also exhibited specialty films in central Philadelphia. The Ritz consisted of two separate five-screen facilities: the Ritz Five Theatres and the Ritz at the Bourse.[2] As the court below recognized, the Ritz was superior to the Roxy in many respects (36a) (finding that Ritz generated higher grosses, with better facilities and equipment, provided better marketing for its films, and had a better payment records, and that Miramax's choice to

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2. Other theatres operated in downtown Philadelphia during the relevant time period, in competition with the Ritz and the Roxy, and most continue to operate.

license exclusively to the Ritz was reasonable). By contrast, the Roxy was far less profitable, and had been in and out of business over the years.

Although Orson contends in its statement of the case that the Roxy offered better "financial terms" for certain films (Petition at 2) Orson ignores the many other factors that Miramax had discretion to consider and did consider when making its licensing decisions.[3] Miramax perceived the Roxy as inferior to the Ritz and the other theatres in the Center City area and, hence, as undesirable for first runs. Not surprisingly, it chose to license its films to the Ritz over the Roxy for the important first runs.

Between January, 1992 and February, 1994, Miramax licensed approximately 28 films to the Ritz on a first-run basis, and one film on a subsequent run basis. During the same time period, Miramax licensed to the Roxy one film for a first-run, and fourteen films for subsequent runs. Although the Roxy sought licenses from Miramax for some of the first run films Miramax licensed to the Ritz, its requests were refused by Miramax because of Miramax's desire to exhibit its films at the more popular and attractive Ritz and other venues.

All of the first-run licenses Miramax granted to the Ritz were exclusive for central Philadelphia. The evidence was uncontroverted that, because of the more limited market for specialty films, the Ritz would not have exhibited most of the Miramax films at issue in this case if they had also been licensed during the first run to another competing theatre within Central Philadelphia.

C. The Present Action.

Orson commenced this lawsuit against Miramax in August, 1993, alleging antitrust claims under state common law and Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as various

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3. To the extent that Orson claims that it offered to Miramax a higher percentage of box office receipts than did the Ritz, it overlooks the fact that the box office receipts at the Roxy would not equal those from the Ritz.

claims under the Pennsylvania Motion Picture Fair Business Practices Act (the "Pennsylvania Act"), 73 Pa. Cons. Stat. Ann. § 203-1. Orson contended that Miramax's decision to grant exclusive licenses to the Ritz for several of its films and its refusal to license those films for exhibition at the Roxy violated both the antitrust laws and the Pennsylvania Act.[4]

With respect to its antitrust claims, Orson asserts that the "clearances" were the result of a "clandestine conspiracy" to refuse to deal with the Roxy, with the "clearances providing the vehicle by which the conspiracy was effected" (Petition at 3). Significantly, the District Court granted summary judgment as to *all* of Orson's claims in October, 1994 except claims as to six Miramax films under the Pennsylvania Act's 42-day provision, Section 203-7 (11a). On the antitrust claims, the District Court found as a matter of law that Miramax's decisions to license first runs on an exclusive basis to the Ritz were both reasonable and pro-competitive. *Id.* The Court of Appeals affirmed that holding (37a).

As to the Pennsylvania Act's 42-day provision,[5] the Court of Appeals reversed summary judgment and remanded those claims to the District Court for trial (43a). In so doing, the Third Circuit rejected the interpretation of Section 203-7 previously applied by the District Court and held, instead, that Section 203-7 required distributors to terminate their exclusive first run licenses after 42 days and to "expand" the run to other theatres

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4. Orson also alleged violations of certain other provisions of the Pennsylvania Act. Those claims were dismissed at trial, and Orson does not challenge that dismissal.

5. The 42-day provision section 203-7 of the Pennsylvania Act, 73 Pa. Stat. Ann. § 203-7 (entitled "Length of Run") provides as follows:

> [n]o license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run [of a copyrighted motion picture] . . . for more than 42 days *without provision to expand the run to second run or subsequent run theaters within the geographical area* (emphasis added).

in the same geographic area as the exclusive first run licenses (44a).[6]

After remand, the claims against Miramax under the 42-day provision were tried to a jury, which returned a verdict in favor of Orson. Based on its finding that the 42-day provision required Miramax to grant to Orson exclusive licenses for seventeen films, the jury awarded Orson minimal damages consisting of ten percent of the profits Orson claimed it would have earned had it exhibited those films.[7] The assumption implicit in this verdict was that the 42-day provision required Miramax to terminate its exclusive first run licenses to the Ritz after 42 days and, thereafter, to grant exclusive licenses for those films to the Roxy, regardless of Miramax's wishes (50a-59a).

Miramax appealed the judgment to the Court of Appeals for the Third Circuit, contending, among other things, that the 42-day provision, both on its face and as applied by the Court of Appeals in this case, was preempted by the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.* and the Supremacy Clause, that there was no evidence that Miramax had "willfully and intentionally" violated the Pennsylvania Act, 73 Pa. Const. Stat. Ann § 203-10, and that there was no evidence that Miramax would have licensed its films to the Roxy, as opposed to one of the other theatres in central Philadelphia, had it been forced to terminate exhibition at the Ritz after 42 days. A different panel of the Court of Appeals agreed with Miramax that the 42-day rule was preempted by the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.* and the Supremacy Clause (80a-89a, 101a). After granting Orson's Petition for Rehearing because of the need to reconcile the panel's preemption ruling with prior decisions of other panels (72a-80a), the Court of Appeals, sitting

6. The District Court initially interpreted Section 203-7 to be satisfied by expansion of the run in other geographic areas than the first run clearance, thereby preserving the exclusivity of the first run license in its geographic area (12a).

7. Following the jury's verdict, Miramax moved for Judgment as a Matter of Law, or in the Alternative for a New Trial. That motion was denied.

en banc, issued its unanimous decision agreeing with the initial panel's decision and reversing the District Court's judgment.

REASONS FOR DENYING THE WRIT

Pursuant to Congress' express constitutional authority to "promote the progress of the Useful Arts, by securing to Authors . . . the exclusive right to their respective writings" (U.S. Const., Art. I, Sec. 8, cl. 8), the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.*, gives to copyright holders the exclusive right to exhibit, or license others to exhibit (or not to license at all) their copyrighted works for up to the full term of the copyright. 17 U.S.C. § 106. The 42-day provision which is unique to Pennsylvania, imposes liability for the mere exercise of these federally protected rights, and vests those rights in persons other than the copyright holder. Based upon well-settled principles of copyright and conflict preemption, a unanimous Court of Appeals, sitting *en banc*, properly held that that state law was preempted; its decision in no way warrants the extraordinary remedy of Supreme Court review.

The unanimous decision of the Court of Appeals was completely consistent with, and indeed, compelled by, prior decisions of this Court and other Courts that have considered comparable restrictions. No prior opinion of this Court or any other Circuit Court of Appeals has ever upheld a restriction comparable to the statute at issue in this case; to have done so would be contrary to all applicable precedent. Orson's attempt to compare the statute at issue to antitrust laws directed at concerted market activity fails because the 42-day provision does not restrain a copyright owner from violating other state or federal laws; instead, it prevents the copyright owner from exercising the very rights granted to it under copyright law.

As to Orson's challenge to the Court of Appeals' decision upholding summary judgment against its antitrust claims, the Court of Appeals followed a long and unbroken line of authority upholding vertical non-price restraints such as the clearances at issue in this case under the "rule of reason." Orson presents no grounds for disturbing that decision.

ARGUMENT

I. There is No Reason to Grant Certiorari on Orson's Antitrust Claims.

A. The Third Circuit faithfully followed the decisions of this Court and an "avalanche of authority" in permitting Miramax to grant exclusive licenses to the Ritz.

In concluding that Miramax did not violate the antitrust laws by licensing its films to Orson's competitors for exclusive first runs, the Court of Appeals applied the teaching of an unbroken line of precedent extending back over 50 years. Beyond the film industry, it is well-established that exclusive distribution arrangements, whether "clandestine" or otherwise, are legal — virtually *per se* legal. In *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), the court held that exclusive distributorships are lawful unless part of a scheme to monopolize an entire market. "The fact that . . . other dealers in the same product . . . are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement." *Id.* at 421. In *Packard*, the court concluded that the right of one supplier of automobiles to limit distribution of its brand to one or a few dealers was so clear that the supplier could lawfully terminate existing dealers in Baltimore, Maryland and concentrate distribution in a single dealer. *Id.*

In *GTE Sylvania Inc., v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977), the court recognized that "[t]here is a veritable avalanche of precedent to the effect that, absent evidence of monopolization, a manufacturer may legally grant . . . an exclusive franchise." *See TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc.*, 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Elder-Beerman Stores Corp. v. Federated*

Dep't Stores, 459 F.2d 138, 146 (6th Cir. 1972); *Futurevision Cable Systems of Wiggens, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993); *Northeastern Educational Television of Ohio, Inc. v. Educational Television Assn.*, 758 F. Supp. 1568 (N.D. Ohio 1990); *Philadelphia Fast Foods, Inc. v. Popeyes Famous Fried Chicken, Inc.*, 647 F. Supp. 216, 224 (E.D. Pa. 1986). The Court has recognized that "interbrand competition is the primary concern of the antitrust laws," *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988), and that "so long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Id.* at 725.

For this reason, courts have uniformly held that where a defendant faces significant competition in the relevant market, *i.e.*, where interbrand competition exists, competition will not be unreasonably restrained by the defendant's refusal to supply its product to the plaintiff. As a matter of law, the availability of competitive products precludes a finding of injury to competition. *See, e.g., R.W. International Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487 (1st Cir. 1994) (affirming summary judgment for defendant because competitive products of defendant were available in the marketplace: "to survive summary judgment, plaintiffs needed to demonstrate a genuine dispute as to whether defendants actions injured competition, as distinguished from impact on themselves."); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1173 (9th Cir. 1988) (affirming summary judgment: plaintiff "has not presented any evidence that [defendant] controlled the surplus milk supply in California."); *Elder-Beerman Stores Corp. v. Federated Department Stores*, 459 F.2d 138, 148 (6th Cir. 1972) (reversing judgment for plaintiff: "The plaintiff's theory virtually ignored the necessity for proof that comparable alternative brands were not available."); *Ace Beer Distributors, Inc. v. Kohn*, 318 F.2d 283, 287 (6th Cir. 1963). ("There is no allegation or contention that the beer of other breweries was not just as

available in that area after the change in distributors as it was before."), *cert. denied*, 375 U.S. 982 (1964).

As the Court of Appeals found, *Theee Movies of Tarzana v. Pacific Theaters, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), applies this fundamental principle to the film distribution industry. In that case, the plaintiff claimed that clearance agreements gave certain theatres an unreasonable competitive advantage. The Ninth Circuit Court of Appeals rejected this assertion, holding that the defendant film distributors had a legitimate business interest in the revenue generated by the theatres, because the distributors were paid, in part, out of the films' gross profits. *Id.* at 1399 (*citing United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145-46 (1948)). Clearances are "reasonable restraints of trade"

> when the theaters are in substantial competition, and the clearances are used to assure the exhibitors that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor's expected income will be greatly diminished.

The "whole system of runs and clearances . . . purposely, *and legitimately*, discriminates between competing theaters." *Id.* (quoting *Naumkeag Theatres Co., Inc. v. New England Theaters, Inc.*, 345 F.2d 910, 912 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965)) (emphasis added). To paraphrase the Court of Appeals, although Miramax's "clearances reduced intrabrand competition by preventing [Orson] from showing first run movies simultaneously with the [Ritz] . . . they also encouraged interbrand competition by forcing [Orson] to find alternative subrun movies to exhibit and to promote." *Id.* at 1399.

Here, it is undisputed that the Ritz and Orson were in substantial competition and that both were located in central Philadelphia. In fact, the existence of competition between the Ritz and Orson is essential to Orson's claim. The dispute between Orson and Miramax involves exactly the type of clearance agreement at issue in *Theee Movies of Tarzana*, and

is entirely permissible under the antitrust laws. Contrary to Orson's assertion, the Court of Appeals did not hold all clearances in all circumstances to be lawful per se; rather, the Court found reasonable a clearance arrangement whereby the Ritz was given first runs that excluded Orson's theatre, which was in substantial competition with the Ritz. This wholly unremarkable application of settled antitrust principles to undisputed facts is not worthy of review by this Court.

As in *Theee Movies of Tarzana* and an "avalanche" of other exclusive distributorship cases, a decision by Miramax to license the Ritz exclusively did not in any way foreclose Miramax's rivals from distributing their films, nor did it foreclose Orson from licensing the films of those rivals. Thus, the result of the purported agreement by Miramax to limit distribution of its films to the Ritz created more interbrand competition, not less, and there was no violation of the antitrust laws.

B. The Third Circuit's decision is consistent with, and supported by, the Ninth Circuit's opinion in *Harkins*.

Orson nevertheless contends that this Court should grant its petition to resolve a purported conflict between the Court of Appeals' decision and the decision of the Ninth Circuit Court of Appeals in *Harkins Amusement Enterprises, Inc. v. General Cinema Corporation*, 850 F.2d 477 (9th Cir. 1988) ("*Harkins Amusement*"). Orson can advance this argument only by distorting the holding in *Harkins Amusement* and making the startling assertion that "the Ninth Circuit held that nonprice, vertical restraints of trade strikingly similar to those at issue here were *per se* illegal, and were not subject to the rule of reason at all" (Petition at 18). The Ninth Circuit held no such thing, and the Court of Appeals in this case "ignored" *Harkins Amusement* only because it is a horizontal conspiracy case having no application here.

Orson's antitrust claim is premised on the contention that Miramax's decision to license its films for first runs exclusively to Orson's principal competitor in central Philadelphia — the Ritz — constituted a non-price, vertical restraint that is *per se*

illegal. Orson does not contend — and there is no evidence — that Miramax conspired with other distributors to deprive Orson of first run films or that the Ritz conspired with other exhibitors for the same purpose. Nor does Orson allege that Miramax has monopoly power over films distributed for theatrical exhibition. As it did before the Court of Appeals, Orson uses language in its petition suggesting that there is something unique about Miramax films which requires that it be treated as a quasi-monopolist, The Court of Appeals rejected this suggestion:

> We also note that Orson did not allege nor did it present evidence to show that Miramax was a monopolist or that *only Miramax* constituted the relevant product market. . . . We make these points because Orson's antitrust theory frequently seemed premised on an analysis of a market which was limited to Miramax's product.

(40a, n.12). As the Court of Appeals properly held, the relationship between Miramax and the Ritz constitutes a routine vertical restraint, and "[t]he Supreme Court has instructed that vertical restraints of trade which do not present an express or implied agreement to set resale prices, are evaluated under the rule of reason. *Business Elec. Corp. [v. Sharp Elec. Corp.]*, 485 U.S. [717] at 724 [(1988)]; *See also Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)." (33a). Absent a monopoly, which is not present here, a distributor may license or not license any entity it wishes.

Harkins Amusement presents an entirely different scenario. Plaintiff in that case challenged an agreement among exhibitors in the Phoenix, Arizona area known in film industry parlance as a "split":

> Splits are exhibitor agreements that divide a normally competitive market by allocating pictures to particular members and prohibiting bidding for licensing rights to films assigned. Phoenix exhibitors met regularly in the mid-1970's and divided rights

> to films on a picture-by-picture basis. Harkins was not a split member.

850 F.2d at 480-81 (citations omitted). The defendants in *Harkins Amusement* included seven regional film exhibitors and nine national film distributors. The distributor defendants acknowledged the existence of the split among the Phoenix area exhibitors which excluded plaintiff, but the distributors argued that they were victims of, not participants in, the split arrangement. The district court granted summary judgment to the defendant distributors on all counts. The primary issue before the court of appeals was whether evidence existed to show that the exhibitors in the split engaged the distributors in their *horizontal* conspiracy.

> Harkins contends that it was excluded from fairly competing for films as a result of active participation by the distributors in the Phoenix split. Of course, if the only function of the split was to eliminate competitive bidding by the split members for the distributors' films, it makes no sense to say that the distributors participated in the split. If the split members, in addition to their agreeing not to bid against each other, also agreed to secure the cooperation of distributors in excluding Harkins from the first-run market, then such a combination would constitute a Sherman Act violation.

850 F.2d at 484.

The court of appeals concluded that sufficient evidence existed to permit an inference that the distributors participated in the unlawful conspiracy: "Harkins has presented factual support of a conspiracy between exhibitors and individual distributors to split the Phoenix film market and unreasonably restrain competition." *Id.* at 485. Thus the existence of a horizontal conspiracy among exhibitors — which is absent from Miramax's relationship with the Ritz — was central to the holding that "the split agreement alleged [by Harkins Amusement] . . . if proven, is illegal *per se*." *Id.* at 486.

See Nynex Corp. v. Discon., Inc., 525 U.S. 128, 119 S. Ct. 493, 498 (1998) (refusing to apply per se rule to case involving only vertical restraints because "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors").

Unlike Orson's analysis, the *Harkins Amusement* court was careful to distinguish between the horizontal split agreement and a "clearance," a vertical relationship whereby a distributor chooses to license a first run film exclusively to one exhibitor in an area, a decision that excludes other exhibitors in that area from exhibiting that film. Indeed, in affirming the district court's grant of summary judgment for the distributors on the claim of unreasonable clearances, the *Harkins Amusement* court relied on the same body of law as the Court of Appeals in this case, extending back to this Court's decision in *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948);

> Clearance is a contract term allowing an exhibitor a degree of exclusivity within a particular market. "Clearances preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid is accepted." *Theee Movies of Tarzana v. Pacific Theaters, Inc.*, 828 F.2d 1395, 1397 (9th Cir. 1987).

850 F.2d at 486. Thus, there is no conflict, but rather only consonance, between *Harkins Amusement* and the Court of Appeals' decision in this case, and there is no basis for the issuance of a writ of certiorari here.

Simply put, the Court of Appeals was right when it concluded that Miramax may distribute films through any exhibitor it chooses, and the antitrust laws do not impose an obligation that Miramax use Orson — either in place of or in addition to the Ritz. The fact that some theatres or consumers might find some Miramax films more desirable than the available alternatives does not make an exclusive agreement

with the Ritz anticompetitive. *See K.M.B. Waterhouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123 (2d Cir. 1995). There, the defendant rejected the plaintiff's request to distribute Walker brand automotive exhaust system products and advised the plaintiff that its existing distributors preferred that Walker not add the plaintiff as a distributor. In *K.M.B.*, the Court of Appeals for the Second Circuit examined the effect on competition of the defendant manufacturer's refusal to supply the plaintiff and determined that Walker's decision to limit its distribution did not violate the Sherman Act because the products of other manufacturers were available to the plaintiff. *Id.* at 128.

Orson's heavy reliance on the irrelevant "split" discussion in *Harkins Amusement* and its liberal use of sinister-sounding terms like "clandestine," "conspiracy," and "group boycott" notwithstanding, Orson has alleged no more that the type of vertical non-price restraint held lawful in many cases both within and outside the film distribution industry. Accordingly, Orson's petition should be denied with respect to its antitrust claims.

II. There is No Reason to Grant Certiorari on Orson's Claim Under the Pennsylvania Act.

A. The United States Copyright Act — as confirmed by this Court's decisions — grants a copyright holder the right to grant an exclusive license, as well as the right to "refuse to license" the copyrighted work.

Section 301(a) of the Copyright Act preempts all state laws that (either facially or as applied) purport to grant, create, or destroy rights that are equivalent to any of the exclusive rights within the scope of the Copyright Act:

> On and after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any

> such right or equivalent right in any such work under the common law or statutes of any state.

Under Section 301, any state law which purports to prohibit the exercise of the copyright holder's exclusive right to distribute copies or exhibit copyrighted works or license to others for up to the term of the copyright, is expressly preempted. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 443 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982) (state law is preempted whether it "creates, grants or destroys" exclusive rights granted under the Copyright Act). The Court of Appeals correctly applied that provision to this case.

The rights reserved to copyright holders under Section 106 of the Copyright Act, 17 U.S.C. § 106, include, among others, the following exclusive rights, which are protected by this provision:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
>
> (4) in the case of . . . motion pictures . . . , to perform the copyrighted work publicly; . . .

17 U.S.C. § 106.

As this Court has held, these Section 106 rights include the right "to grant an exclusive or restrictive license to others to exhibit [a work]." *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). Moreover, a "copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207, 228-229 (1990), *citing Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). So strong is this protection that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Id.*; *see also Schnapper v. Foley*, 667 F.2d 102, 114, n.4 (D.C. Cir. 1981) ("Unless there is a specific

exception, we take Congress to have vested in the copyright holder the liberty not to license rights in his work.") The exclusivity of those rights of exploitation by the copyright holder is at the very heart of the Copyright Act's protection and its purpose to foster creation and dissemination of creative works. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

The rights set forth in Section 106 of the Copyright Act do not end after 42 days. To the contrary, the copyright holder's rights under Section 106 last for the full term of the copyright. Nor does a copyright holder's decision to license rights in the first place for a limited period of time eliminate those rights in the future. The copyright holder has the right to enter into a single exclusive license for up to the full copyright term, or a series of successive exclusive licenses for shorter terms.

As interpreted by a panel of the Court of Appeals for the Third Circuit, the 42-day provision both (1) prohibits the copyright holder from licensing its films exclusively to the exhibitor of its choice for more that 42 days, and (2) requires the copyright holder to "expand the run" *to other theatres* after 42 days, thereby implicitly vesting those exhibition rights in those other theaters after 42 days (44a). Because the state law establishes rights equivalent to those granted under federal copyright law, it is preempted.

This Court has recognized the importance to preemption analysis of determining how a law is applied in practice, as well as its language. Determination of whether a statute is preempted requires consideration of the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). In this case, the 42-day rule was applied to take away from Miramax and give to Orson rights that are governed by Section 106 of the Copyright Act and that belong exclusively to the copyright holder. Section 301 provides that those rights are governed exclusively by the Copyright Act, and that "no person is entitled to any such right or equivalent right

in any such work under the common law or statutes of any state." Orson's claim divested Miramax of those protections in the following ways.

First, the 42-day provision was applied to impose liability on Miramax for failing to grant a license to Orson. Under the facts of the case, the 42-day provision required Miramax to grant Orson a license against its wishes. Absent the 42-day provision, Miramax would not have chosen to associate its films with the Roxy during their critical first runs.

Second, due to the nature of the geographic market, the 42-day provision was applied here in a manner that would have forced Miramax to terminate exhibition of its films at the Ritz after 42 days. The evidence at trial demonstrated that the Ritz would not exhibit Miramax's films simultaneously with another exhibitor. Thus, the Roxy would have been the *exclusive* exhibitor after 42 days. The jury's verdict acknowledges the fact of this forced termination; profits could have been earned by Orson only if it *replaced* the Ritz as the *exclusive* exhibitor.

Third, Section 203-7 provides that, in addition to making "provision to expand the run" after 42 days, "prints of said feature motion picture *shall be made available by the distributor to those subsequent run theatres* that normally would be served on subsequent run availability." 73 Pa. Stat. Ann. § 203-7 (emphasis added). Thus, in addition to requiring compulsory licensing to the Roxy, Section 203-7, as applied, required Miramax to print additional release prints of its copyrighted films — i.e. to make copies, another one of the exclusive rights reserved to copyright holders under Section 106 of the Copyright Act — and to provide those release prints to third party exhibitors, like the Roxy, with whom Miramax did not wish to do business.

The 42-day provision took from Miramax and gave to Orson the right to exhibit Miramax's copyrighted works and the right to decide who would exhibit those works. Therefore, as applied, it is preempted by Section 301. The absurdity of arguing that a state may compel an artist to display his or her works in an

unwanted gallery is immediately apparent. Similarly, most would think it equally outrageous for a state to compel political writers to make their works available for publication by a magazine or periodical not of their choice. Motion pictures are no less protected by copyright than are other works of art or writings. Miramax, as the copyright holder, has the right under the Copyright Act to select the venue in which its films are to be exhibited. Orson had no right to demand copies of Miramax's films for exhibition, and no state law could permissibly give it that right without violating Section 301.

B. The Court of Appeals correctly followed this Court's precedents in holding that a state law which restricted a copyright holder's right to grant an exclusive license, or which restricted the copyright holder's unilateral decision to refuse to grant a license, was preempted by federal law.

The Supremacy Clause of the United States Constitution declares that statutes enacted by the United States Congress are the "supreme law of the land." U.S. Const., Art. VI. A state law is preempted if it purports to govern matters which are the subject of a federal law and it conflicts with the federal law; this is referred to as "conflict preemption." *See Mite Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980) ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.")

Under "conflict preemption," a state law is preempted if, " 'under the circumstances of this particular case, [the] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Jones v. Rath Packing Co.*, 430 U.S. at 526-527 (citation omitted); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974). This Court has held that "[w]hen state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied,' by the state law." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225,

229 (1964), *quoting Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

Lower courts have not hesitated to apply this rule to invalidate state laws that prohibit the exercise of rights reserved to copyright holders under section 106 of the Copyright Act. *See, e.g., Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1536 (M.D. Ala. 1992) (*citing Associated Film Distributions Corp. v. Thornburgh*, 683 F.2d 808, 816 (3d Cir. 1982)) ("[a] copyright holder cannot be subject to a state-law created liability simply because it engaged in protected copyright activity").

In *Storer Cable*, the court held that a local ordinance which prohibited producers of television programs from entering into exclusive licenses with cable operators for exhibition of those programs was preempted by the Copyright Act:

> [I]t is apparent that the two preemption inquiries, conflict preemption and § 301 express preemption, lead to the same essential question: If Ordinance 48-90 creates liability for a copyright holder and a licensee *simply because the copyright holder granted an exclusive license to exhibit her work*, then the ordinance cannot stand under the copyright laws. *Exclusive licensing is one of the rights in the copyright monopoly and is in and of itself not anti-competitive behavior, and thus local governments may not ban the practice per se.*

Id. at 1536 (emphasis added); *see also Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (state law requiring disclosure of copyrighted test materials would be preempted if not protected as "fair use" under Copyright Act), *cert. denied*, 502 U.S. 862 (1991); *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 574-575 (4th Cir. 1994) (state trade secret law may not be used to prevent copyright holder from exercising right to publish copyrighted work.)

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710-711 (1984), this Court considered a state law which required

local cable operators to delete liquor commercials from programming. The Court held that, even though the law did not expressly prohibit exercise of protected rights, the law was preempted because requiring cable operators to modify the programming would have the effect of causing them to lose the benefit of compulsory licenses provided to cable operators under the Copyright Act. The state law at issue conflicted both with FCC regulations governing cable operators and with provisions of the Copyright Act addressing compulsory licenses. Therefore, it was preempted because the "state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law." *Id.* at 716.

Similarly, in *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, the Second Circuit held that a state law that compelled a College Entrance Examination Board to disclose copyrighted test materials would be preempted unless it were protected as a "fair use" under the Copyright Act. *AAMC v. Cuomo*, 928 F.2d at 523. On remand, in *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the district court applied this rule and issued an injunction against enforcement of the law, because it interfered with the copyright holder's exercise of the exclusive right under the Copyright Act to decide when and to whom to disseminate its copyrighted material.

> Given the broad disclosure requirements of the STA, the Court is left with the inescapable conclusion that the STA interferes with the moving plaintiffs' exclusive ownership rights as set forth in section 106 of the Copyright Act. It does so, for example, by requiring those plaintiffs to disclose their test forms and the individual test questions which, for various reasons, they wish not to disclose.

College Entrance Examination Bd. v. Pataki, 889 F. Supp. at 564.

Here, the jury's verdict imposed liability on Miramax under the 42-day provision simply for exercising one of the rights the

Copyright Act specifically grants, the right to grant an exclusive license with an exhibitor of its choice with a term longer than 42 days. Thus, the state statute denies a copyright holder benefits that the Copyright Act affords it — the grant of exclusive rights under Section 106 for the full term of copyright protection.

Orson does not seriously dispute that the 42-day provision conflicts with the grant of exclusive rights under the Copyright Act. Instead, Orson argues that conflict preemption may not even be considered because the Copyright Act contains an express preemption clause.[8] As support for this argument, Orson cites this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a case that did not involve the Copyright Act. Orson's reliance on *Cipollone* is misplaced; the argument that *Cipollone* forecloses consideration of implied preemption by any statute containing an express preemption clause was specifically rejected by this Court in its later opinion in *Freightline Corporation v. Myrick*, 514 U.S. 280 (1995).

In *Myrick*, the plaintiff cited *Cipollone* for the proposition that implied preemption could not be considered where a statute includes an express preemption provision. 514 U.S. at 287. This Court disagreed, holding that, even where an express preemption clause has been enacted, a state law may still be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 287-288.

> As an initial matter, we must address the argument that we need not reach the conflict preemption issue at all. According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, . . . held that implied preemption cannot exist when Congress has chosen to include an express preemption clause in a statute. This argument is without merit. . . .
>
> The fact that an express definition of the preemptive reach of a statute "implies" — i.e.,

8. The judgment could indeed be affirmed on express preemption grounds. However, this issue need not be addressed because the Court of Appeals' conflict preemption analysis is correct.

> supports a reasonable inference — that Congress did not intend to preempt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best, Cipollone supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Myrick, 514 U.S. at 288-289 (citation omitted). Indeed, as this Court noted in *Myrick*, *Cipollone* considered whether the statute at issue conflicted with federal law, even though the federal law contained an express preemption provision.

Moreover, the language in *Cipollone* on which Orson relies applies only to "field preemption" based on Congressional intent to occupy an entire field, and *not* to conflict preemption that arises when a state law actually conflicts with a federal statute. *Cipollone*, 505 U.S. at 517. By contrast, under the circumstances presented here, the Supremacy Clause requires that the state law give way to the federal statute.

This Court (and lower courts) have used "conflict preemption" to strike down state laws that prohibit activity protected by the Copyright Act. *See, e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 710-711 ("such a loss of viewing options would plainly thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals."). These precedents are applicable here.

C. The Court of Appeals' decision is consistent with, and indeed supported by, this Court's decision in *Interstate Circuit* and other cases involving concerted refusals to deal.

Orson contends that the Court of Appeals' decision that the 42-day provision is preempted by the Copyright Act conflicts with prior decisions of this Court upholding the power of the states and the federal government to prohibit agreements in restraint of trade. The cases Orson cites are inapplicable. They did not involve the mere granting of exclusive licenses permitted

by the Copyright Act; rather they dealt with the "additional elements" of combinations and agreements in restraint of trade.

Cases such as this Court's opinion in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), address the power of states and the federal government to regulate concerted anti-competitive conduct by copyright holders.[9] By contrast, the 42-day provision is not an antitrust law directed at combinations in restraint of trade. Instead, it prohibits unilateral decisions that copyright law otherwise permits, namely, the granting of exclusive licenses of longer than 42 days. No case has ever upheld such a blanket exercise of state power over rights protected by the Copyright Act.

Interstate Circuit addressed the validity of the federal antitrust laws as applied to a horizontal agreement among competing distributors to take uniform action with respect to exhibitors in order to help a single powerful exhibitor. The Court upheld the power of the states to prohibit such concerted action, *notwithstanding* that copyrighted works were involved: "Although the films were copyrighted, appellants do not deny that the conspiracy charge is established if the distributors *agreed among themselves to impose the restrictions upon subsequent-run exhibitors*." *Id.* at 221 (emphasis added). Thus, the conduct proscribed in *Interstate Circuit* was not the exercise of exclusive rights under the Copyright Act. To the contrary, the Court recognized that those rights constitute a "legal monopoly" protected by the Copyright Act, and emphasized that the Copyright Act empowers film distributors "to exhibit the picture *and to grant an exclusive or restrictive license to others to exhibit it*." *Id.* at 227 (emphasis added).

The Court explained that while each distributor individually, as a copyright holder, had the right to impose exclusive restrictions on their exhibitors by *individual action*, the same

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9. Orson also cites this Court's decision in *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932). That decision upheld the power of states to tax the proceeds of film licenses, and did not address the power of the states to regulate the terms of those licenses.

restrictions were not so protected when they were pursuant to an agreement *among competitors* to restrain competition. This critical distinction is explained in the following passage:

> Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. *The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor.*

Id. at 228 (emphasis added).

United States v. Paramount Pictures, 334 U.S. 131 (1948), makes this very point. There, the Court upheld the power of the federal government to prohibit price fixing by copyright holders. The Court noted specifically that the exclusive rights set forth in Section 106 of the Copyright Act give rise to a protected monopoly, and liability could not be imposed merely for exercise of that monopoly. However, that monopoly did not allow a copyright holder to use those protected rights as "a part of the general plan to suppress competition." *Id.* at 144.

Similarly, in *Watson v. Buck*, 313 U.S. 387 (1941), the Court upheld a state law barring price fixing combinations among authors, publishers and other copyright holders. As in *Paramount Pictures*, the proscribed conduct was not the use of exclusive licenses, but "combinations in restraint of trade." *Id.* at 404. *Watson* merely authorizes states to regulate such combinations, not to enact prohibitions that go to the heart of the grant of rights under copyright. In sum, these decisions in no way support Orson's contention that a state may permissibly attack the "legal

monopoly" granted to copyright holders under the Copyright Act.

D. The decision of the Court of Appeals for the Third Circuit in this case is consistent with the Sixth Circuit's decision in *Allied Artists*, which Orson admits did not contain a restraint on the copyright holder's ability to grant an exclusive license.

In an attempt to create a basis for arguing that a "conflict among the circuits" requires this Court to grant *certiorari*, Orson asserts that the Third Circuit's decision in this case conflicts with an earlier Sixth Circuit decision in *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), *aff'g*, 496 F. Supp. 408 (S.D. Ohio 1980). However, Orson acknowledges its own error when it notes that "the Ohio legislation at issue in *Allied Artists* does not contain a provision limiting the duration of exclusive 'first run' film licenses" (Petition at 17). This critical distinction eliminates the basis for its concocted "conflict" with respect to the 42-day provision.

Allied Artists involved an Ohio statute that, like the Pennsylvania Act, regulated certain marketing practices by motion picture distributors, such as "blind bidding." Those provisions were upheld by the Sixth Circuit, and, consistent with that holding, the Third Circuit likewise upheld comparable provisions, such as prohibitions against blind bidding, in the Pennsylvania Act. The Sixth Circuit never considered a provision that flatly prohibited exclusive licenses of longer than a legislated period because the Ohio statute included no such regulation.

Allied Artists makes it clear that, had the Sixth Circuit considered a statute with a provision comparable to the 42-day provision, it would have reached the same result as the Third Circuit in this case. In *Allied Artists*, the Court of Appeals upheld the Ohio statute precisely because it did *not* "deprive motion picture copyright owners of their rights to prohibit reproduction, performance, distribution or display of their work; nor does it vest the rights to reproduction, performance or display in

exhibitors or any other person." *Allied Artists*, 679 F.2d at 663. That, however, is precisely what the 42-day provision does. Far from contradicting the Third Circuit, the Sixth Circuit explicitly recognized that its holding on preemption would have been quite different had it been faced with a law which, like Pennsylvania's 42-day rule, both deprived the copyright holder of its right to prohibit exhibition of its works through exclusive licenses, and vested that right in others.

In a footnote, Orson cites *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F. Supp. 1518 (M.D. Ala. 1992), as further support for its argument that the Third Circuit's decision conflicts with decisions of other courts (Petition at 17, n.8). This citation is surprising, because the district court in *Storer Cable* held the Copyright Act preempted a state law that made exclusive licenses *per se* illegal, while upholding other portions of the same law that invalidated such licenses upon proof that they had an anti-competitive effect. Like other courts, the *Storer Cable* court distinguished between laws that regulate agreements in restraint of trade (that this Court has held not preempted) and laws that simply prohibit copyright holders from granting exclusive licenses in their works (which are preempted). *Storer Cable*, 806 F. Supp. at 1538-1539.

In sum, the Third Circuit's decision was completely consistent with, and compelled by, all prior applicable precedent, the law of sister circuits, and the language of the Copyright Act and Supremacy Clause. The Court of Appeals correctly held that the 42-day provision was preempted.

CONCLUSION

For the foregoing reasons, respondent Miramax Film Corp. respectfully requests that this Court dismiss the Petition for Certiorari of petitioner Orson, Inc.

Respectfully submitted,

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